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DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-219349 **DATE:** June 18, 1985

MATTER OF: Frontier Manufacturing Company

DIGEST:

1. Protest of the rejection of a bid because the information submitted with the bid in a brand name or equal procurement did not show that it was equal to the specified brand name product is dismissed because the protest provides no information showing that the product offered was equal to the product specified.

2. Protest of agency's use of brand name or equal specifications is untimely where the solicitation clearly set out such specifications and protest was not filed prior to bid opening.

3. Protest on grounds that agency conducted "negotiations" with brand name producer prior to issuance of the solicitation, thereby violating the prohibition in the Federal Acquisition Regulation against pre-solicitation release of procurement information, is dismissed where the protester does not show that actual negotiations took place or that the contact was anything more than an agency effort to confirm the currency of the producer's specifications prior to their use in a brand name or equal procurement.

Frontier Manufacturing Company protests the rejection of its bid under invitation for bids (IFB) No. 8FC0-B1-57475 issued by the General Services Administration (GSA). The solicitation invited bids to provide Penco Products storage racks or equal, and GSA rejected Frontier's bid because it was unable to determine from the information submitted by Frontier that its storage rack was equal to Penco's rack. Frontier requests that the solicitation be canceled and a new solicitation specifying only the minimum needs of GSA be issued. We dismiss the protest.

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Frontier has provided no information in its protest showing that the storage rack it offered was, in fact, the equal of the specified Penco product. Moreover, although Frontier seeks a resolicitation specifying the agency's actual minimum needs, it has provided no information indicating in what respect the current specifications do not reflect GSA's actual minimum needs or are ambiguous or have been unreasonably interpreted by GSA. Thus, Frontier has not shown that the rejection of its bid was improper or that the specifications were defective.

Frontier contends that GSA has a history of requesting Penco products and that as a result, Penco is not required to submit to the same requirements as the other bidders under the evaluation of bids clause. However, Frontier has provided no evidence showing that the brand name or equal procurement approach here was not in compliance with the Federal Acquisition Regulation (FAR) provision (48 C.F.R. § 10.004(b) (1984)) governing the use of brand name or equal purchase descriptions. Moreover, any impropriety perceived by Frontier in GSA's use of the Penco specifications should have been protested prior to bid opening. Under section 21.2(a)(1) of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), protests based on alleged improprieties in an invitation for bids which are apparent prior to bid opening must be filed prior to bid opening. See G.A. Braun, Inc., B-216645, Feb. 21, 1985, 85-1 CPD ¶ 218. Frontier's protest on this ground is untimely because the IFB clearly set out the Penco specifications and indicated that the racks offered by all other bidders would be evaluated against them to determine if they were equal.

Frontier also contends that it was informed by GSA after the rejection of its bid that prior to issuance of the solicitation, GSA had conducted "negotiations" with Penco to determine if Penco could manufacture a storage rack with 21 foot uprights. Frontier insists that this violated the FAR, 48 C.F.R. § 14.211. This section provides that information concerning proposed acquisitions shall not be released outside the government before solicitation, except when pre-invitation notices are used to determine if firms are interested in the invitation or when long range acquisition estimates are issued. Frontier

argues that GSA's pre-solicitation contact gave Penco the opportunity to confirm that its uprights met the specifications without giving the other prospective bidders the same opportunity.

Frontier's use of the word "negotiations" to describe GSA's contact with Penco before the solicitation is not supported by any information showing that actual contract price or technical negotiations took place or that the contact was anything other than an effort by GSA to confirm the currency of Penco's specifications before using them in the brand name or equal procurement. Moreover, as Frontier was given an opportunity to demonstrate that it could supply a product meeting the specifications by responding to the solicitation and as there is no evidence that Frontier's product was the equal of Penco's, we see no prejudice to Frontier in such a contact even if Penco may have confirmed its own compliance prior to issuance of the solicitation. While Penco might have surmised that a procurement was imminent it is difficult to see what advantage it could have obtained under the circumstances here.

Based on the information submitted by Frontier, we dismiss the protest.

Ronald Berger

Ronald Berger
Deputy Associate
General Counsel